

ELLEN F. ROSENBLUM  
Attorney General  
ROBERT E. SULLIVAN #983539  
Senior Assistant Attorney General  
Department of Justice  
1162 Court Street NE  
Salem, OR 97301-4096  
Telephone: (503) 947-4700  
Fax: (503) 947-4791  
Email: Robert.Sullivan@doj.state.or.us

Attorneys for Defendants Bugher, Crites, DiGiulio, and Irving

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

JABBAR SACHET AL-KHAFAGI,

Plaintiff,

v.

CHARLES C. SUNG, MD; (FNU) CRITES,  
Oregon State Correctional Institution (OSCI),  
Registered Nurse (RN); LORETTA IRVING,  
(OSCI) Medical Services Manager;  
CHRISTOPHER DIGIULIO, Oregon  
Department of Corrections (ODOC) Medical  
Director; JOE BUGHER, ODOC Health  
Services Administrator; and JOHN AND  
JANE DOES 1-20,

Defendants.

Case No. 2:19-CV-00669-MO

DEFENDANTS' ANSWER TO PLAINTIFF'S  
AMENDED COMPLAINT (#52) AND  
AFFIRMATIVE DEFENSES

*JURY TRIAL DEMAND*

Cari Crites, R.N.; Joe Bugher; Christopher DiGiulio, M.D.; and Loretta Irving, R.N.,  
(hereinafter “State Defendants”) answer plaintiff’s Complaint as follows:

1.

Admit that the Oregon Department of Corrections (ODOC) employs Cari Crites as an Institution Registered Nurse at the Oregon State Correctional Institution (OSCI) located in Salem.

2.

Admit that ODOC employs Joe Bugher as Assistant Director of Health Services.

3.

Admit that Christopher DiGiulio, M.D., is a physician licensed to practice medicine in the State of Oregon and is employed by ODOC as Medical Director.

4.

Admit that Loretta Irving, R. N., is employed by ODOC as Medical Services Manager at OSCI.

5.

Admit Jabbar Sachet Al-Khafagi is an adult admitted to the custody of ODOC on July 24, 2014, is currently housed at OSCI, and has an earliest release date of November 29, 2029.

6.

In accordance with Paragraph 10, admit that State Defendants were acting at times relevant under color of law.

7.

In accordance with Paragraph 11, agree that CD-214 is synonymous with Kyte or Inmate Communications Form, CD-117 is synonymous with Inmate Grievance Form, admit that CD-117b is synonymous with Staff Grievance Response Form or Grievance Response Form; admit that CD-117c is synonymous with AIC Grievance Appeal Form or Grievance Appeal Form; admit that I/M is synonymous with Inmate or Adult-in-Custody or AIC; admit that C/O is synonymous with Correctional Officer; admit that OSCI is synonymous with Oregon State

Correctional Institution; admit that TRCI is synonymous with Two Rivers Correctional Institution; admit that ODOC is synonymous with the Oregon Department of Corrections.

8.

With respect to Paragraphs 12-76, 77-78, and 79-80, State Defendants presently lack sufficient information to respond to the allegations in plaintiff's Complaint and therefore deny them pending discovery.

9.

Except as expressly admitted herein, defendants lack sufficient information to respond to all remaining allegations in plaintiff's Complaint and therefore deny them.

**JURY DEMAND:**

10.

Defendants hereby invoke their right to trial by jury of all issues so triable.

**AFFIRMATIVE DEFENSES:**

11.

Defendants incorporate herein the admissions, denials and allegations set forth above:

**FIRST AFFIRMATIVE DEFENSE:**

(Qualified immunity)

12.

Defendants allege that at all times relevant to plaintiff's Complaint, they were acting in good faith and within their discretion pursuant to the laws and statutes of the State of Oregon and the United States, and defendants' conduct violated no clearly established statutory or constitutional rights of which a reasonable official would have knowledge.

**SECOND AFFIRMATIVE DEFENSE:**

(Eleventh Amendment Immunity)

13.

To the extent plaintiff alleges that the State of Oregon or its political subdivisions are responsible for the claims asserted, the State of Oregon asserts that it is immune from suit in federal court and protected under Eleventh Amendment immunity. *NRDC v. California Dept. of Trans.*, 96 F.3d 420, 421 (9th Cir. 1996).

**THIRD AFFIRMATIVE DEFENSE**

(Prison Litigation Reform Act)

14.

To the extent one or more of plaintiff's claims are brought under 42 USC 1983, defendants assert all provisions of the Prison Litigation Reform Act including the provision requiring exhaustion of administrative remedies, to plaintiff's claims; and requiring injunctive relief to be narrowly tailored to address a plaintiff's claims.

**FOURTH AFFIRMATIVE DEFENSE:**

(Statute of Limitations / Tort Notice)

15.

ORS 12.110(4) establishes a two-year period within which to bring an action to recover for damages or injuries arising in negligence. Some or all of Plaintiff's claims may be barred thereby. The statute of limitations in a §1983 suit is the same as provided under state law for personal-injury torts. *Wallace v. Kato*, 549 U.S. 384, 387 (2007). In Oregon, personal injury claims are governed by the two-year statute of limitations set forth in ORS 12.110, and, therefore, § 1983 claims are subject to the same two-year limitation period. *Sain v. City of Bend*, 309 F.3d 1134, 1139 (9th Cir. 2002). For some or all of Plaintiff's claims, over two years may

have passed since the events giving rise to said claims or damages and, accordingly, those claims may be subject to dismissal with prejudice.

The Oregon Tort Claims Act (Or. Rev. Stat. 30.265 et seq.), at ORS 30.275(1) *et seq.*, establishes a requirement, with certain exceptions, of timely notice (within 180 days) regarding tort claims not involving wrongful death. For some or all of Plaintiff's claims, more than 180 days may have lapsed between the alleged date of the subject events (May, 2017, or when Plaintiff should reasonably have ascertained the facts establishing a prospective claim) before notice as to the events giving rise to said claims or damages and the persons or entities whose conduct is alleged to have constituted a breach or violation. Accordingly, those claims may be subject to dismissal with prejudice for failure to timely give tort notice.

**FIFTH AFFIRMATIVE DEFENSE:**  
(Substitution)

16.

The State of Oregon reserves the right to substitute itself as and for one or more individually-named Defendants if the same shall be legally cognizable.

**RESERVATION OF ADDITIONAL DEFENSES:**

17.

Defendants reserve the right to assert additional defenses as may become known to them through investigation and discovery.

**WHEREFORE**, defendants pray for judgment herein denying plaintiff relief and granting defendants their costs, disbursements and attorney fees incurred in the defense hereof.

DATED June 23, 2020.

Respectfully submitted,

ELLEN F. ROSENBLUM  
Attorney General

*s/ Robert E. Sullivan*

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ROBERT E. SULLIVAN #983539  
Senior Assistant Attorney General  
Trial Attorney  
Tel (503) 947-4700  
Fax (503) 947-4791  
Robert.Sullivan@doj.state.or.us  
Of Attorneys for Defendants

**CERTIFICATE OF SERVICE**

I certify that on June 23, 2020, I served the foregoing DEFENDANTS' ANSWER TO PLAINTIFF'S AMENDED COMPLAINT (#52) AND AFFIRMATIVE DEFENSES upon the parties hereto by the method indicated below, and addressed to the following:

**JABBAR SACHET AL-KHAFAGI**  
**SID#10877333**  
Oregon State Correctional Institution  
3405 Deer Park Drive SE  
Salem, OR 97310-9385  
*Pro Se Plaintiff*

☐ HAND DELIVERY  
☒ MAIL DELIVERY  
☐ OVERNIGHT MAIL  
☐ TELECOPY (FAX)  
☐ E-MAIL  
☐ E-SERVE

s/ Robert E. Sullivan  
ROBERT E. SULLIVAN #983539  
Senior Assistant Attorney General  
Trial Attorney  
Tel (503) 947-4700  
Fax (503) 947-4791  
Robert.Sullivan@doj.state.or.us  
Of Attorneys for Defendants